

STATE OF MICHIGAN
COURT OF APPEALS

A & B LEASE COMPANY,

Plaintiff-Appellee,

v

TRACTOR SUPPLY COMPANY OF
MICHIGAN,

Defendant,

and

PARK WEST DEVELOPMENT, INC.,

Defendant-Appellant.

UNPUBLISHED

September 30, 2008

No. 275628

Clinton Circuit Court

LC No. 05-009887-CK

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

After a jury trial, defendant Park West Development, Inc., appeals as of right from a judgment awarding plaintiff damages of \$175,000 on its breach of contract claim. The trial court also awarded plaintiff interest of \$13,858.36 and taxable costs of \$456.72, for a total judgment of \$189,315.08. We affirm.

This case arises from plaintiff's sale of a parcel of land in St. Johns, Michigan, to Park West, which planned to develop the property for operation of a retail store by Tractor Supply Company of Michigan. The parties' purchase agreement contemplated that plaintiff would "provide . . . easements and/or access to enable future taps to all utilities," but "that all additional work to provide these utilities will be done at [Park West's] expense." The purchase agreement did not specify which party bore responsibility for arranging for, or overseeing, any required utility work.

Plaintiff and Park West subsequently had several discussions concerning utility work. Before the closing, plaintiff's owner, Bernard Feldpausch, informed Park West that if it did not agree to use Les Miller & Sons as the contractor for the utility work, the sale would not occur. Park West agreed to allow Les Miller & Sons to perform the work, but maintained that it did so only to facilitate completion of the sale. Plaintiff thereafter hired Les Miller & Sons to perform the work, paid for the work, and then sought reimbursement from Park West.

At trial, after the trial court had instructed the jury, but before the jury began deliberating, Park West stipulated that “[plaintiff] should recover damages and, therefore, the only question is the amount of those damages.” On appeal, Park West raises several claims of error, but we find that Park West waived three of these claims at trial by stipulating to its liability for breach of contract. In light of the stipulation, we conclude that Park West has waived appellate review of its claims that (1) the trial court erred in denying its motion for a directed verdict on plaintiff’s breach of contract claim, (2) the trial court erred in instructing the jury on the rule requiring construction of ambiguous contractual provisions against the document’s drafter, and (3) insufficient evidence supported the jury’s conclusion that Park West was obligated to pay for utilities.

“A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal.” *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006). “Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.” *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

In each of the three issues identified above, Park West contests its liability for breach of contract. For example, Park West contends that no enforceable agreement for the installation of utilities ever arose, and that the evidence was insufficient to enable the jury to find that Park West was obligated to pay plaintiff for utility extension expenses. Park West additionally argues that the trial court erroneously instructed the jury on the rule of “contra proferentem,”¹ and that this error caused Park West prejudice because it presented evidence contradicting that it ever intended or was obligated to pay plaintiff for utilities. However, Park West removed the issue of its liability for breach of contract from the jury when it agreed at trial that plaintiff could recover damages, and that the jury only would determine the amount of those damages. By so agreeing, Park West waived any claim of error related to the issue of its liability.

In its sole remaining appellate issue, Park West asserts that the trial court erred by denying its request to instruct the jury on plaintiff’s duty to mitigate damages in accordance with M Civ JI 142.35. This Court reviews de novo claims of instructional error. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). “Jury instructions should not omit material issues, defenses, or theories that are supported by the evidence.” *Id.* at 83-84. “Instructional error warrants reversal if it ‘resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be ‘inconsistent with substantial justice.’” *Id.* at 84, quoting *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985), quoting MCR 2.613(A).

Park West insists that the evidence supported a jury instruction on plaintiff’s failure to mitigate damages because the evidence showed that plaintiff did not approach the city of St. Johns about obtaining a “cash to tap” agreement to recoup some of the costs of extending the

¹ See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003).

utilities to Park West's property, or approach other landowners who eventually might tap into the utility lines.

Park West's requested instruction would have advised the jury that, in determining the amount of damages, it should "not include any loss that [plaintiff] could have prevented by exercising reasonable care and diligence when [it] learned or should have learned of the breach." M Civ JI 142.35. The alleged breach in this case involved Park West's refusal to reimburse plaintiff for expenses associated with utility work that already had been completed, at which point mitigation had become impossible. The evidence also established that the city of St. John's had never previously entered into a "cash to tap" agreement with a private developer, and that any such agreement with a municipality must be entered into before any work begins. Because the evidence revealed that a "cash to tap" agreement was not feasible when plaintiff learned of the breach, the duty to mitigate instruction did not apply to the circumstances of this case. Although Park West had informed plaintiff, before the utility extension work took place, that Park West intended to pay only its "fair portion" of off-site utility costs, the evidence did not substantiate any reason that plaintiff should have interpreted that statement as a breach of Park West's agreement to be responsible for the utility expenses.

Accordingly, the trial court did not err in denying Park West's request for an instruction on plaintiff's duty to mitigate its damages.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra